LIBRARY
SUPREME COURT, U. S.

AUG

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 54

M. P. HOWLETT, INC.,

Petitioner,

—against—

The Tug MICHAEL MORAN, TUG MICHAEL MORAN, INC., and MORAN TOWING & TRANSPORTATION CO., INC.,

Respondents.

BRIEF IN OPPOSITION

EUGENE UNDERWOOD
Counsel for Respondents
Office and Post Office Address
25 Broadway
New York, New York 10004

KENNETH H. VOLK
of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

M. P. HOWLETT, INC.,

Petitioner,

—against—

The Tug MICHAEL MORAN, TUG MICHAEL MORAN, INC., and MORAN TOWING & TRANSPORTATION CO., INC.,

Respondents.

BRIEF IN OPPOSITION

The Court of Appeals reversed the Trial Court "upon the law and the facts" (Pet. 16a). In both instances the Court was fully justified in its reversal.

Facts

Petitioner fails to mention that derrick barge HOWLETT No. 6 was unseaworthy, as expressly found by the District Court. Her stern compartment filled with water because of a leak which was hidden from view and unknown to those on tug MICHAEL MORAN (Pet. 4a). Thus, the emergency situation which arose as the tug and barge reached their destination at the south side of Pier 9, Weehawken was solely the fault of the barge.

Petitioner also fails to mention that efforts to pump the barge continued during the entire time the MICHAEL MORAN remained alongside the barge at the pier. Petitioner suggests that the tug did nothing from 9:35 P.M., when the after manhole cover came awash, until 11:15 P.M. when she capsized. But the District Court made no such finding. The record clearly shows that just the opposite is true. The Court of Appeals notes that "the uncontradicted testimony is that from the time of berthing (roughly 9:15 P.M.) to the time the tug cast off and the barge capsized, the crew members were engaged in seeking some way to pump out the water in the stern compartment" (Pet. 10a-11a). The reason they had such difficulty in opening the manholes was because they were cemented shut (C.A. Appendix 9a, 59a, 68a-9a).

Petitioner states that Captain Morrissey testified he "gave no thought to beaching at all" (p. 5),* again implying that he stood by and watched the barge settle and capsize without making any attempt to save her. Morrissey made it very clear however that he gave no thought to beaching for a very good reason, viz., because it was not a reasonable or even possible alternative course of action. As the tug and tow arrived at the unlighted and deserted Pier 9 the barge was in serious condition, her stern compartment flooding through her wasted internal exhaust pipe. Captain Morrissey testified that if he had thrown off the lines from the tug to the barge while alongside, the barge, with her high vertical boom and unstable flooded condition, would have capsized then and there. In fact, it was the

---

*Actually those were not Morrissey's words, but the words of the trial judge who asked him: "Q. That thought [beaching] didn't come to your mind at all? A. No, sir" (C.A. Appendix 56a).

three lines from the tug to the starboard side of the barge that prevented her capsizing sooner. They were so taut that according to the tug's deck hand they were "humming" with the strain. Captain Morrissey therefore chose to stay alongside and hold the barge erect as long as possible, while continuing the efforts to find a way to pump her out (C.A. Appendix 49a, 52a, 62a).

It was only when the barge became so heavy with water that there was imminent danger of the tug's being pulled under that Capt. Morrissey gave the order to cast off at 11:15 P.M. When he did, the barge immediately capsized, missing the tug by a scant 5 feet (C.A. Appendix 50a, 62a, 70a).

In addition to these considerations Morrissey also had in mind that the draft of the MICHAEL MORAN was 14 feet whereas the draft of the barge was only 6 feet, making it impossible for the tug to get into water shallow enough to beach the barge without first going aground herself (C.A. Appendix 52a).

Finally, he could not be sure that there were no other more serious dangers from submerged, unseen objects such as logs, sunken piles etc. which might imperil the barge as well as the MICHAEL in any beaching attempt (C.A. Appendix 11a, 52a).

The only evidence in support of the beaching theory, as the Court of Appeals states, is the testimony of petitioner's two "experts". Neither was given all the facts. They were given no information about the instability of the barge, or the draft of the tug, or that the tug was making continuous efforts to pump the barge—although both witnesses conceded that pumping should be the very first action taken (C.A. Appendix 24-5a, 29a, 39-40a, 41a).

On these facts, the Court of Appeals rightly concluded that the District Court had erred in applying the wrong rule of law as to the standard of care required. The evidence in support of beaching was simply not sufficient to sustain a charge of negligence against the tug under all the circumstances.

Law

Petitioner attempts to inject legal grounds in support of the petition by raising the question of scope of review, asserting a conflict between the Second Circuit and other Circuits. The short answer is that this issue was never presented to the Court of Appeals. None of the arguments or cases cited by petitioner at page 6 first paragraph were presented below, not even in the Petition for Rehearing. This Court has long held that it will not review what the Court below did not decide. *Walters* v. *City of St. Louis*, 347 U.S. 231, 233; *United States* v. *New York Telephone Company*, 326 U.S. 638, 651 (note 18).

In any event, the asserted conflict between Circuits does not exist. The Court of Appeals reversed because:

> "We conclude that these facts present a situation of sufficient peril and immediacy to require the application of a standard of law different from the standard of ordinary maritime negligence relied upon by the trial court" (Pet. 16a).

The standard of conduct to be applied to given facts is universally treated as a question of law, the Ninth Circuit included, *Pacific Tow Boat Co.* v. *States Marine Corp. of Delaware* (9 Cir. 1960), 276 F.2d 745, 752; and see collected cases in 5 Moore's Federal Practice §52.03[1].

CONCLUSION

If Judge Friendly was correct when he said in his dissenting opinion below that this case deals with "largely factual issues", then it is *sui generis* and holds no broad legal significance meriting review by this Court. However, the true reason for reversal by the Court of Appeals was on the law, as demonstrated by the portion of the majority opinion last quoted above. The Court of Appeals found that the District Court had erroneously applied a standard of care requiring the use of 20-20 hindsight in an emergency situation due solely to petitioner's furnishing a barge whose unseaworthiness was not known or apparent. This does not present any significant legal question which requires this Court's attention or which needs final resolution here. The petition should therefore be denied.

Respectfully submitted,

EUGENE UNDERWOOD
Counsel for Respondents
Office and Post Office Address
25 Broadway
New York, New York 10004.

KENNETH H. VOLK
of Counsel

August 28, 1970.